

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 2.6.202, 2.6.203, and 2.6.209 ) PROPOSED AMENDMENT  
pertaining to state vehicle use )

TO: All Concerned Persons

1. On November 1, 2012, at 1:00 p.m., a public hearing will be held in Room 53 of the Mitchell Building, 125 N. Roberts St., Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Administration (department) will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on October 25, 2012, to advise us of the nature of the accommodation that you need. Please contact Brett Dahl, Risk Management and Tort Defense Division, P.O. Box 200124, Helena, Montana 59620-0124; telephone (406) 444-3687; TDD (406) 444-1421; facsimile (406) 444-2592; or e-mail to bdahl@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.6.202 DEFINITIONS As used in this subchapter, the following definitions apply:

(1) "Measurable amount of alcohol" means the alcohol concentration of the person's breath or blood is .02 or more.

(1) and (2) remain the same, but are renumbered (2) and (3).

~~(3)~~(4) "State vehicle" means a motor vehicle, ~~semitrailer~~, snowplow, or other vehicle designed for travel on public roads that is subject to motor vehicle registration, including any machinery or apparatus attached to the vehicle. The term includes the following:

(a) through (d) remain the same.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: State employees operate and drive a variety of trailers in addition to semitrailers. The change to "State vehicle", therefore, reflects this fact. The department considered another alternative to this proposed amendment. One alternative was to list the trailers that state employees currently operate and drive. The department rejected this alternative because given that the type of trailers employees will operate and drive will change over time, the department determined it would not be a productive use of resources to regularly amend the rule.

The Statement of Reasonable Necessity for the definition of "Measurable amount of alcohol" is included with ARM 2.6.209 below.

2.6.203 AUTHORIZED DRIVERS AND USES (1) through (1)(h) remain the same.

~~(i) a nonstate employee who is an independent contractor or an employee of a temporary employment agency contracting with the state with prior approval from the agency head when a state employee is not available to operate the vehicle. The contractor must complete the RMTD's vehicle use agreement. The agreement must be signed by the agency head and presented to the motor pool or affected state agency prior to the use; and~~

~~(j)(i) a nonstate employee accompanying a state employee on official state business where the state employee becomes ill, fatigued, or is otherwise rendered physically or mentally incapable of driving and/or a compelling state interest is served by allowing the nonstate employee to drive. Prior approval is not required; and~~

(j) an inmate of a state prison who must operate a state vehicle to fulfill job duties for a position with Montana Correctional Enterprises or a state prison, and who is approved by the appropriate division as outlined in Montana State Prison/Montana Women's Prison/Montana Correctional Enterprises Procedure. If an inmate who is allowed to drive on Department of Corrections' property under this rule does not have a valid driver's license, the inmate may drive a state vehicle if:

(i) the inmate has a valid facility driving permit;

(ii) is timely paying fines, if any, associated with the inmate's loss of a driver's license; and

(iii) is working toward obtaining a valid state of Montana driver's license.

(2) remains the same.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to eliminate the rule section allowing operation of state vehicles by independent contractors for several reasons. The Montana Tort Claims Act, 2-9-101, MCA, et seq. applies to claims filed against a governmental entity (the state and its political subdivisions) for money damages only because of personal injury or property damaged caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of employment. The term does not apply to an independent contractor under contract to a governmental entity.

The department initially allowed the use of state vehicles by independent contractors in an attempt to address the infrequent situation where a state employee was unavailable to operate the vehicle. However, experience has shown that the use has become more commonplace, exposing the state to greater potential liability. The department believes that eliminating this use of state vehicles by independent contractors will establish consistency for all state agencies and reduce the state's potential liability risks.

An alternative to the department's proposed approach is that agencies could seek approval from the Risk Management and Tort Defense Division allowing independent contractors to operate state vehicles. The department rejected this approach because the division does not have the personnel to review these requests, and this approach does not address the increased potential liability issue.

Another alternative is that each agency would have a quota of uses of a state vehicle by an independent contractor. Once the quota was reached, the agency could not allow a contractor to operate a state vehicle. While this approach would give the agencies some flexibility, it too does not address the potential liability issue.

The reason the department is proposing the rule regarding inmates driving state vehicles is to clarify the department's intent on this matter. Since around 1981, inmates have been driving and operating vehicles and equipment to perform daily assignments at the state prison. A question was raised about the ability of an inmate with a commercial driver's license and passenger endorsement to drive a bus transporting other inmates to and from the Work and Reentry Center located at the prison. The current rule does not address inmates driving vehicles, so the department believes it is important to resolve the ambiguity.

The Governor's guiding principles for the Department of Corrections include the rehabilitation of inmates. Rehabilitation is provided in part through participation in various programs, some of which require and depend on an inmate's ability to drive and operate vehicles and equipment. This activity exposes qualified inmates to productive, "real life" activities that will benefit them once released.

The inmate workers that are trained in the work programs and that may be driving vehicles or equipment are sentenced to the Montana State Prison (MSP) and are under the Department of Corrections care and custody. Inmates who work outside the fenced MSP perimeter are of a custody classification level that allows them to work in these areas. There are a limited number of inmates meeting these requirements. All inmates are thoroughly screened before moving to outside work areas and receiving authorization to drive. In this screening, MSP and Montana Correctional Enterprises (MCE) review, among other things, whether an inmate has a valid license, court ordered restrictions, and institutional behavior. Simply because an inmate has a valid license does not mean that the inmate will drive a vehicle or operate equipment. Need and work assignment guide the decision. The majority of driving occurs on MSP or MCE property. Some driving, however, occurs on the paved road between the prison facility and the railroad siding in Deer Lodge, a distance of about four miles. Any inmate driving off of prison property is supervised, and the inmate must have the appropriate current Montana driver's license.

One particular program worthy of note is the MCE inmate driver's license program that is run in cooperation with the Department of Justice (DOJ) to assist inmates with obtaining or keeping current their license. This program involves on-site training and testing by an MCE employee who DOJ has certified to administer both the written and practical driving tests. The practical test is done at the prison facility. A similar program has been implemented at the women's prison in Billings, where the practical test is done at the Billings Metra parking lot, which use is authorized through a memorandum of understanding with Yellowstone County.

Currently, 148 inmates have valid MSP/MCE permits, which may be approved for the operation of vehicles, equipment, or both. This 148 number is broken down

as follows: 40 restricted inmates who may operate motor vehicles and equipment, but do not have a valid Montana driver's license; 20 restricted inmates who may operate slow-moving equipment only; and 88 unrestricted inmates who have a current valid driver's license.

There are around 40 vehicles and 30 self-propelled pieces of equipment that are assigned for approved inmate use. These vehicles are not being operated at the same time; rather, use is dictated by need. If the qualified inmates were unable to drive and operate vehicles and equipment to perform the assigned work, the programs may have to be curtailed or, in some cases, eliminated. These programs are self-supporting, essentially paying for the costs of operation.

In July 2008, MCE identified all inmate-driven vehicles on the driver and passenger doors and the back of the vehicle with the words "inmate driver." In addition, in October 2008 MCE installed GPS tracking units on all inmate-driven vehicles. Vehicles are monitored for speed and location, and when the inmates enter or exit a designated area, they must provide notice to security and other designated staff.

In summary, allowing inmates to drive and operate vehicles and equipment is critical to the operation of various MSP and MCE inmate work programs, which are designed to provide work programming and rehabilitation. Most of the driving occurs on MSP or MCE property. Any driving off property is supervised, and the inmate must have the appropriate current Montana driver's license.

The department did consider the alternative of not allowing inmates to drive state vehicles. However, given the Department of Corrections strong support for this program and the benefits to the inmates and the state, the department rejected this alternative.

2.6.209 ALCOHOL AND DRUGS (1) No person ~~under the influence of~~ may drive a vehicle for state business who has a measurable amount of alcohol, illegal drugs, or improperly used prescription drugs in their system ~~may drive a vehicle for state business.~~

(2) No person may drive a vehicle for state business ~~under the influence of~~ who has taken any legally prescribed drug if that drug affects the person's ability to safely operate the vehicle.

(3) remains the same.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: Montana law defines "under the influence of alcohol" to mean that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished. 61-8-401(3)(a), MCA. Under this definition, a person could consume alcohol, drugs, or a combination of the two, and still operate a vehicle so long as done so safely. The department, however, believes that no state employee should operate a vehicle after consuming (1) any measurable amount of alcohol or drugs or improperly used prescription drugs, or (2) properly used prescription drugs if such use affects the person's ability to safely operate a vehicle.

The department proposes using the standard of "measurable amount of alcohol" to replace the standard of "under the influence." The proposed definition of "measurable amount of alcohol" is an alcohol concentration of the person's breath or blood of .02 or more. This is the standard Montana (61-8-410(1), MCA) and many other states have adopted for purposes of "zero tolerance" of underage drinking and driving. Given this standard, the department saw no need to craft a different standard.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Brett Dahl, Risk Management and Tort Defense Division, P.O. Box 200124, Helena, Montana 59620-0124; telephone (406) 444-3687; TDD (406) 444-1421; facsimile (406) 444-2592; or e-mail to bdahl@mt.gov, and must be received no later than 5:00 p.m., November 9, 2012.

5. Mike Manion, Chief Legal Counsel, Department of Administration, has been designated to preside over and conduct this hearing.

6. The Risk Management and Tort Defense Division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request, which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the department's web site at <http://doa.mt.gov/administrativerules.mcp.x>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

By: /s/ Sheryl Olson  
Sheryl Olson, Deputy Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State October 1, 2012.